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ABSTRACT

This Staff Brief provides background information on state and federal laws and regulations, relevant proposals recently considered by the Wisconsin Legislature and laws and proposals of selected other states relating to sexual harassment. Part I provides an overview of the state's employment discrimination law as it specifically relates to sexual harassment. This part describes substantive and procedural rights and responsibilities in both the public and private sectors of employment. This part also describes other legal grounds for pursuing relief in court for acts of sexual harassment. Part II describes other state statutory provisions relating to sexual harassment and also describes proposals recently considered by the Wisconsin Legislature. Part III describes federal law and administrative and court interpretations of the law on sexual harassment, including recent developments. Part IV describes selected laws and legislation in other states relating to sexual harassment (ABL)

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OVERVIEW OF STATE AND FEDERAL LAW ON SEXUAL HARASSMENT

Staff Brief 92-9

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September 9, 1992

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
PART I - WISCONSIN LAW ON SEXUAL HARASSMENT IN THE WORKPLACE: FAIR EMPLOYMENT LAW	3
A. SEXUAL HARASSMENT DEFINED	4
B. COVERAGE	4
1. Individuals and Entities Subject to Sexual Harassment Prohibition	4
2. Persons Protected Against Sexual Harassment	5
C. PROHIBITED CONDUCT; EMPLOYER LIABILITY	5
D. PROCEDURE FOR CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE BY NONSTATE EMPLOYES	6
1. Complaints of Sexual Harassment	6
2. Investigation and Determination of Probable Cause	7
3. Conciliation	8
4. Hearing	8
5. Decision and Order (Remedies)	9
6. Appeal to Labor and Industry Review Commission	10
7. Judicial Review	10
8. Enforcement	10
E. PROCEDURE FOR CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE BY STATE EMPLOYES	10
F. ADMINISTRATION OF FAIR EMPLOYMENT LAW	11
G. EXCLUSIVE NATURE OF FAIR EMPLOYMENT LAW; OTHER CAUSES OF ACTION	12
1. Worker's Compensation	12
2. Independent Tort Actions for Assault or Battery	12

Page

PART II - WISCONSIN LAW ON SEXUAL HARASSMENT: OTHER STATUTORY PROVISIONS AND RECENT LEGISLATION 15

A. STATUTORY PROVISIONS REQUIRING INFORMATION ON SEXUAL HARASSMENT TO STUDENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM AND VOCATIONAL, TECHNICAL AND ADULT EDUCATION SCHOOLS 15

B. RECENT LEGISLATION: 1991 SENATE BILL 297, RELATING TO LIABILITY OF PUBLIC EMPLOYES FOR DISCRIMINATION AND SEXUAL HARASSMENT 15

C. RECENT LEGISLATION: 1991 ASSEMBLY BILL 1079, RELATING TO SEXUAL HARASSMENT TRAINING AND EDUCATION IN THE WORKPLACE 17

1. Definition of "Sexual Harassment" 17
2. Prohibited Conduct in Relation to Sexual Harassment 17
3. Failure to Inform Employer of Sexual Harassment 17
4. Workplace Posting 17
5. Employe Notification 18
6. Employe Education and Training 18
7. Internal Complaint Process 19

D. RECENT LEGISLATION: 1991 SENATE BILL 1, RELATING TO CREATING A PRIVATE CAUSE OF ACTION FOR CERTAIN CIVIL RIGHTS VIOLATIONS 19

PART III - FEDERAL LAW ON SEXUAL HARASSMENT IN THE WORKPLACE . . . 21

A. DEFINITION OF SEXUAL HARASSMENT UNDER FEDERAL LAW AND GUIDELINES 21

1. Title VII 21
2. EEOC Guidelines 21

B. EXTENT OF EMPLOYER LIABILITY 22

C. PROCEDURES FOR PURSUING CLAIMS UNDER TITLE VII 23

1. Filing a Claim 23
2. EEOC Procedures 24

Page

D. FEDERAL REMEDIES; RECENT CHANGES 24

E. COMPARISON WITH OTHER FEDERAL CAUSES OF ACTION 25

F. RECENT FEDERAL CASE LAW 26

1. Elements of a Hostile Environment Sexual Harassment Claim 26
2. Severity of Conduct for Establishing Hostile Environment Claim 27
3. Point of View in Determining Hostile Environment 27
4. Victim's Conduct or Personality as a Defense 28
5. Sexual Nature of Offensive Conduct 28
6. Employer Liability for Acts of Employe 29

PART IV - SEXUAL HARASSMENT LAWS AND LEGISLATION IN OTHER STATES 31

Wisconsin Legislative Council | *Madison, Wisconsin*

Special Committee on Sexual Harassment | *September 9, 1992*

Staff Brief 92-9*

OVERVIEW OF STATE AND FEDERAL LAW ON SEXUAL HARASSMENT

INTRODUCTION

This Staff Brief was prepared for the Legislative Council's Special Committee on Sexual Harassment. The Special Committee was established by a May 28, 1992 mail ballot and directed to study sexual harassment and to review the adequacy of Wisconsin laws on sexual harassment, including definitions, procedures for acting on complaints, remedies and sanctions, programs to reduce the incidence of sexual harassment and related matters.

This Staff Brief provides background information on state and federal laws and regulations, relevant proposals recently considered by the Wisconsin Legislature and laws and proposals of selected other states relating to sexual harassment.

Part I provides an overview of the state's employment discrimination law as it specifically relates to sexual harassment. This Part describes substantive and procedural rights and responsibilities in both the public and private sectors of employment. Part I also describes other legal grounds for pursuing relief in court for acts of sexual harassment.

Part II describes other state statutory provisions relating to sexual harassment and also describes related proposals recently considered by the Wisconsin Legislature.

Part III describes federal law and administrative and court interpretations of the law on sexual harassment, including recent developments.

Part IV describes selected laws and legislation in other states relating to sexual harassment.

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* This Staff Brief was prepared by Don Dyke and Pam Russell, Senior Staff Attorneys, Legislative Council Staff.

PART I

WISCONSIN LAW ON SEXUAL HARASSMENT IN THE WORKPLACE: FAIR EMPLOYMENT LAW

The basic Wisconsin law relating to sexual harassment in the workplace is contained in Wisconsin's Fair Employment Law, subch. II of ch. 111, Stats. Under the Fair Employment Law, specified acts of employment discrimination, based on enumerated bases, are prohibited [ss. 111.321 and 111.322, Stats.]. Included within the prohibited employment discrimination is employment discrimination based on sex. Sexual harassment was expressly included within employment discrimination based on sex by Ch. 334, Laws of 1981.

The Fair Employment Law begins with a "declaration of policy," providing, in part:

> (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their...[enumerated bases for employment discrimination, including sex] substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals solely because of...[the enumerated bases] deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.
>
> (2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination...and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employe or applicant for employment based upon the employe's or applicant's individual qualifications rather than upon a particular class to which the individual may belong.
>
> (3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of [the enumerated bases].... This subchapter shall be liberally construed for the accomplishment of this purpose [s. 111.31 (1) to (3), Stats.].

A. SEXUAL HARASSMENT DEFINED

"Sexual harassment" is defined under the Fair Employment Law as:

> [U]nwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome, verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes [s. 111.32 (13), Stats.].

B. COVERAGE

1. Individuals and Entities Subject to Sexual Harassment Prohibition

The following are prohibited, under s. 111.321 of the Fair Employment Law, from engaging in any act of employment discrimination, including sexual harassment:

a. Employers

"Employer" is defined as "the state and each agency of the state and...any other person engaging in any activity, enterprise or business employing at least one individual" [s. 111.32 (6) (a), Stats.]. ["Agency" is defined as "an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts."]

"Employer" expressly "does not include a social club or fraternal society...with respect to a particular job for which the club or society seeks to employ or employs a member, if the particular job is advertised only within the membership" [s. 111.32 (6) (b), Stats.].

b. Labor Organizations

"Labor organization" is defined as:

> (a) Any organization, agency or employe representation committee, group, association or plan in which employes participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment; or
>
> (b) Any conference, general committee, joint or system board or joint council which is subordinate to a national or international committee, group, association or plan under par. (a) [s. 111.32 (9), Stats.].

c. Employment Agencies

"Employment agency" is defined as "any person, including [the State of Wisconsin], who regularly undertakes to procure employes or opportunities for employment for any other person" [s. 111.32 (7), Stats.].

d. Licensing Agencies

"Licensing agency" is defined as "any board, commission, committee, department, examining board or officer, except a judicial officer, in the state or any city, village, town, county or local government authorized to grant, deny, renew, revoke, suspend, annul, withdraw, or amend any license" [s. 111.32 (11), Stats.].

e. Other Persons

"Person" is defined in s. 990.01 (26), Stats., to include (but is not limited to) "all partnerships, associations and bodies politic or corporate." The term also includes any individual and thus would include, for example, a co-employe.

2. Persons Protected Against Sexual Harassment

The protections in the Fair Employment Law against sexual harassment in the workplace extend generally to any individual.

C. PROHIBITED CONDUCT; EMPLOYER LIABILITY

It is a prohibited act of employment discrimination under the Fair Employment Law for any employer, labor organization, employment agency, licensing agency or other person:

1. To engage in sexual harassment.

2. To implicitly or explicitly make or permit acquiescence in, or submission to, sexual harassment a term or condition of employment or the basis, or any part of the basis, for any employment decision affecting that employe.

3. To permit sexual harassment to substantially interfere with an employe's work performance or to create an intimidating, hostile or offensive work environment [ss. 111.321 and 111.36 (1) (b), Stats.].

In addition, it is an act of employment discrimination to discharge or otherwise discriminate against an individual because the individual has opposed any discriminatory practice covered by the Fair Employment Law or because the individual has made a complaint, testified or assisted in any proceedings under the Fair Employment Law [s. 111.322 (3), Stats.].

An employer, labor organization, employment agency or licensing agency is presumed to be liable for an act of sexual harassment by that employer, labor organization, employment agency or licensing agency or by any of its employes or members:

1. If the act occurs while the complaining employe is at his or her place of employment or is performing duties relating to his or her employment;

2. If the complaining employe informs the employer, labor organization, employment agency or licensing agency of the act; and

3. If the employer, labor organization, employment agency or licensing agency fails to take appropriate action within a reasonable time [s. 111.36 (1) (b), Stats.].

D. PROCEDURE FOR CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE BY NONSTATE EMPLOYES

The Department of Industry, Labor and Human Relations (DILHR) is responsible for administering the Fair Employment Law [ss. 111.375 to 111.39, Stats.]. One of the powers and duties of DILHR under the Fair Employment Law is the handling of complaints of sexual harassment in the workplace by nonstate employes [s. 111.39, Stats.]. Sexual harassment claims of State of Wisconsin employes are handled by the Personnel Commission [s. 111.375 (2), Stats.; see Section E, below]. Within DILHR, the Division of Equal Rights is the unit responsible for processing claims of sexual harassment. The procedure for sexual harassment claims is generally found in s. 111.39, Stats.; and ch. Ind 88, Wis. Adm. Code.

DILHR requires every employer, employment agency, labor organization and licensing agency subject to the Fair Employment Law to post in conspicuous places on premises a poster, prepared and made available by DILHR, relating to the provisions of the Fair Employment Law and the administrative rules implementing the law [s. Ind 88.21, Wis. Adm. Code].

1. Complaints of Sexual Harassment

DILHR is authorized to receive and investigate a complaint regarding employment discrimination constituting sexual harassment if the complaint is filed with the Department no more than 300 days after the alleged discrimination occurred [s. 111.39 (1), Stats.]. Form, content and filing requirements for complaints are set forth in s. Ind 88.02, Wis. Adm. Code. By rule, the DILHR makes available "appropriate assistance" in completing complaint forms [s. Ind 88.02 (5), Wis. Adm. Code]. By statute, DILHR is required to dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from DILHR concerning the complaint if the Department sends the correspondence by certified mail to the last-known address of the filer.

DILHR is required to maintain the anonymity of any employe who is the aggrieved party in a complaint of discrimination in promotion, compensation or terms and conditions of employment

against his or her present employer until a determination regarding probable cause has been made, unless DILHR determines that anonymity will substantially impede the investigation [s. 111.375 (1), Stats.].

DILHR reviews every filed complaint of sexual harassment to ascertain whether the complainant is protected by, whether the respondent (person or persons against whom the sexual harassment charge is asserted) is subject to, and whether the complaint states a claim for relief under, the Fair Employment Law, and whether the complaint has been timely filed. Unless the above-referenced anonymity requirement applies, DILHR is required to serve on the parties a preliminary determination and order dismissing any complaint which fails to meet these requirements [s. Ind 88.03 (1), Wis. Adm. Code]. Dismissal of a complaint for failing to meet these requirements is appealable to the Administrator of the Division of Equal Rights [s. Ind 88.03 (2), Wis. Adm. Code]. If the Administrator affirms the dismissal, the Administrator's decision is subject to court review.

2. Investigation and Determination of Probable Cause

If a timely filed complaint states a claim for relief under the Fair Employment Law, DILHR is required to serve: (a) a copy of the complaint upon each respondent before the commencement of any investigation, unless the anonymity requirement applies; and (b) a notice requesting a response to the complaint within 10 days after the date of notice [s. Ind 88.05, Wis. Adm. Code].

The Department is required to investigate any complaint that states a claim for relief under the Fair Employment Law [s. Ind 88.06 (1), Wis. Adm. Code]. The Department has subpoena authority to aid in its investigation [s. 111.39 (2), Stats.; and s. Ind 88.06 (1), Wis. Adm. Code].

If it appears during the Department's investigation that the respondent has engaged in sexual harassment against the complainant other than that which is alleged in the complaint, the Department may advise the complainant that the complaint should be amended to so allege [s. Ind 88.06 (2), Wis. Adm. Code].

At the conclusion of its investigation, DILHR is required to issue a written determination whether there is probable cause to believe any sexual harassment occurred as alleged in the complaint. The determination is required to state the facts upon which it is based and must be served on the parties [s. Ind 88.07 (1), Wis. Adm. Code].

If the Department determines there is no probable cause to believe that sexual harassment occurred, it may dismiss the allegations. If the complaint is dismissed, the Department must notify the parties of the complainant's right to appeal [s. Ind 88.07 (3), Wis. Adm. Code]. An appeal of a no probable cause determination is made to DILHR and is heard by a hearing examiner [s. Ind 88.08, Wis. Adm. Code].

If DILHR determines there is probable cause to believe that sexual harassment occurred as alleged in the complaint, it may refer those allegations to conciliation [s. 111.39 (4) (b), Stats.].

3. Conciliation

If the Department refers a sexual harassment case to conciliation, the Department is required to attempt to resolve the dispute between the parties by conciliation unless either party waives conciliation in writing [s. Ind 88.09 (1), Wis. Adm. Code].

If conciliation resolves the dispute, a written conciliation agreement is prepared, stating all measures to be taken by the parties. The agreement may provide for dismissal of the complaint if the dismissal is without prejudice to the complainant's right to pursue the complaint against any respondent who fails to comply with the terms of the agreement [s. Ind 88.09 (2), Wis. Adm. Code].

If conciliation is waived or attempted conciliation is unsuccessful, the Department is required to issue a notice certifying the matter to hearing.

4. Hearing

If a sexual harassment complaint is certified to hearing, the Department is required to notify the parties when and where the hearing on the merits will be held. The hearing must be held not less than 30 days after the date of mailing the notice of hearing either in the county of the respondent's residence or in the county in which the alleged sexual harassment appears to have occurred. A copy of the complaint must be attached to the notice of hearing [s. Ind 88.10, Wis. Adm. Code; and s. 111.39 (4) (b), Stats.].

Within 21 days after the date of notice of hearing, each respondent is required to file with the Division of Equal Rights an answer to the allegations of the complaint. The Department serves a copy of the answer upon all other parties. The required content of the answer is specified in s. Ind 88.11 (2), Wis. Adm. Code.

A pre-hearing conference for any matter set for hearing is authorized but not required [s. Ind 88.12, Wis. Adm. Code]. According to DILHR, pre-hearing conferences are frequently held. Among other things, pre-hearing conferences are held to determine if the case or any issues can be resolved before hearing and to determine the possible length of the hearing.

Specific provisions in DILHR's administrative rules govern various aspects of the hearing procedure, including subpoenas and motions [s. Ind 88.13, Wis. Adm. Code], pre-hearing disclosure and discovery [s. Ind 88.14, Wis. Adm. Code], postponements and continuances [s. Ind 88.16 (4), Wis. Adm. Code], failure to appear [s. Ind 88.16 (5), Wis. Adm. Code] and record of proceedings [s. Ind 88.17, Wis. Adm. Code]. The hearing itself is conducted generally as are other "contested cases" under ch. 227, Stats. Thus, the hearing is conducted substantially as a civil case in a court of record except that the administrative law judge is not bound by common law or statutory rules of evidence [s. 227.45 (1), Stats.].

5. Decision and Order (Remedies)

After the hearing on the claim of sexual harassment, the administrative law judge prepares a formal written decision which is required to contain findings of fact, conclusions of law and an order [s. Ind 88.18 (1), Wis. Adm. Code]. The decision may be accompanied by a memorandum opinion. The order either dismisses the allegations of the complaint or orders "such action by the respondent as will effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint" [s. Ind 88.18 (3), Wis. Adm. Code]. Note that if payment is awarded to an employe because of a prohibited act of employment discrimination by an individual employed by the employer, the employer of that individual is liable for the payment [s. 111.39 (4) (c), Stats.]. If sexual harassment constituting an act of employment discrimination is found to have occurred, the order may:

a. Require the employer to reinstate the employe [s. 111.39 (4) (c), Stats.].

Note that, under some circumstances, compensation in lieu of reinstatement may be ordered (see item c. below).

b. Require the employer to reimburse the employe for back pay [s. 111.39 (4) (c), Stats.].

Back pay liability may not accrue from a date more than two years prior to the filing of the complaint with DILHR. Interim earnings or "amounts earnable with reasonable diligence" by the complainant reduce back pay otherwise allowable. The Wisconsin Supreme Court has ruled that a complainant may be awarded prejudgment interest on back pay [Anderson v. Labor and Industry Review Commission, 111 Wis. 2d 245, 330 N.W. 2d 594 (1983); and s. Ind 88.18 (4), Wis. Adm. Code].

c. If an employer or any employe of the employer has discharged or otherwise discriminated against the complainant because the complainant invoked or otherwise participated in proceedings under the Fair Employment Law, or because the employer believes that the complainant has done or will do so, award compensation in lieu of reinstatement [s. 111.39 (4) (c), Stats.].

Compensation in lieu of reinstatement must be awarded if requested by all parties and may be awarded if requested by at least one party. Any compensation in lieu of reinstatement may not be less than 500 times nor more than 1,000 times the hourly wage of the complainant.

d. Award attorney fees.

Although the award of reasonable attorney fees is not expressly provided for in the Fair Employment Law, the Wisconsin Supreme Court concluded that such awards are necessary to carry out the law's purposes [Watkins v. Labor and Industry Review Commission, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984)].

e. Require other actions that effectuate the purpose of the Fair Employment Law [s. 111.39 (4) (c), Stats.].

According to DILHR, these "other actions" generally are included in orders directed at employers to prevent further occurrences of sexual harassment. For example, the order might require the implementation of training and procedures relating to sexual harassment.

6. Appeal to Labor and Industry Review Commission

A complainant or respondent who is dissatisfied with the findings and order of the administrative law judge may have the findings and order reviewed by the Labor and Industry Review Commission (LIRC) [s. 111.39 (5), Stats.; and s. Ind 88.19, Wis. Adm. Code]. The LIRC consists of three members, appointed by the Governor with the consent of the Senate, for six-year terms. In addition to reviewing DILHR decisions relating to fair employment, the LIRC reviews DILHR decisions relating to unemployment compensation, worker's compensation and fair housing.

A petition for LIRC review must be filed within 21 days after the date that a copy of the administrative law judge's decision and order is mailed to the last-known addresses of the parties [s. 111.39 (5) (b), Stats.; and s. Ind 88.19, Wis. Adm. Code]. The LIRC's review of the administrative law judge's decision is based on the record (i.e., on the evidence submitted to the LIRC, consisting of evidence admitted at the hearing before the administrative law judge). The LIRC may either affirm, reverse or modify the findings or order in whole or in part, or set aside the findings and order and remand the matter to DILHR for further proceedings.

7. Judicial Review

Findings and orders of the LIRC are subject to judicial review under ss. 227.52 to 227.58, Stats. The review is on the record (that is, the court reviews the record established on the administrative level, rather than holding a new hearing, or trial, on the matter) and the scope of the review is limited by statute [s. 227.57, Stats.].

8. Enforcement

Orders in sexual harassment cases under the Fair Employment Law by an administrative law judge or the LIRC are enforceable by forfeiture [s. 101.02 (12) and (13), Stats.] or by injunctive or other equitable relief [ss. 111.39 (4) (d) and 111.395, Stats.].

E. PROCEDURE FOR CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE BY STATE EMPLOYES

Claims of sexual harassment in the workplace by state employes are handled by the Personnel Commission [s. 111.375 (2), Stats.]. The Personnel Commission consists of three members, appointed by the Governor with the consent of the Senate for five-year terms. In addition to processing complaints by state employes under the Fair Employment Law, the Personnel Commission hears a variety of appeals and processes several other types of complaints.

Although there are differences in the details, the procedure for handling complaints of sexual harassment brought before the Commission is similar to that used by DILHR for handling complaints of sexual harassment by nonstate employes. See, generally, chs. PC 1 to 6, Wis. Adm. Code. Decisions of the Personnel Commission on sexual harassment claims are subject to judicial review under ch. 227, Stats. (there is no intermediate level of appeal before judicial review).

The Commission requires every state agency employing persons who may invoke the Commission's jurisdiction to post in conspicuous places on premises a poster, prepared and made available by the Commission, relating to the procedures for invoking the Commission's jurisdiction [s. PC 1.14, Wis. Adm. Code].

F. ADMINISTRATION OF FAIR EMPLOYMENT LAW

In addition to processing complaints of nonstate employes under the Fair Employment Law, DILHR has additional statutory responsibilities and duties in relation to the Fair Employment Law:

1. Promulgate rules necessary to carry out the Fair Employment Law.

2. Conduct, in any part of the state, any proceeding, hearing, investigation or inquiry necessary to perform its functions under the Fair Employment Law.

3. Investigate the existence, character, causes and extent of discrimination in the state and the extent to which the discrimination is susceptible to elimination.

4. Study the best and most practicable ways of eliminating any discrimination found to exist and formulate plans for the elimination of the discrimination by education or other practicable means.

5. Publish and disseminate: (a) reports embodying the Department's findings and the results of the Department's investigations; and (b) studies relating to discrimination and ways and means of reducing or eliminating discrimination.

6. Confer, cooperate with and furnish technical assistance to employers, labor unions, education institutions and other public or private agencies in formulating programs, educational and otherwise, for the elimination of discrimination.

7. Make specific and detailed recommendations to interested parties regarding the methods of eliminating discrimination.

8. Transmit to the Legislature recommendations for any legislation which may be desirable in light of the Department's findings regarding the existence, character and causes of discrimination [ss. 111.375 (1) and 111.38, Stats.].

G. EXCLUSIVE NATURE OF FAIR EMPLOYMENT LAW; OTHER CAUSES OF ACTION

As noted, the Fair Employment Law is the basic Wisconsin law relating to sexual harassment in the workplace. The Fair Employment Law contains no provision for a private cause of action in circuit court for the employment discrimination covered by the law; thus, under state law, the generally exclusive means of redress for sexual harassment in the workplace is under the Fair Employment Law. [See Bourque v. The Wausau Hospital Center, 145 Wis. 2d 589, 427 N.W. 2d 433 (Ct. App. 1988), rev. den., 436 N.W. 2d 29; and Becker v. Automatic Garage Door Company, 156 Wis. 2d 409, 456 N.W. 2d 888 (Ct. App. 1990), rev. den., 458 N.W. 2d 533.] However, other causes of action and administrative remedies have been asserted in employment discrimination actions, including sexual harassment cases. Identified below are some of the other possible state courses of action that may be available to persons subjected to sexual harassment in the workplace.

1. Worker's Compensation

a. Intentional Infliction of Emotional Distress

It appears that sexual harassment that constitutes intentional infliction of emotional distress is compensable under the Worker's Compensation Act [ch. 102, Stats.; Jenson v. Employers Mutual Casualty Company, 154 Wis. 2d 313, 453 N.W. 2d 165 (Ct. App. 1990), rec. den., 471 N.W. 2d 512; and Zabkowicz v. West Bend Co. Div. Dart Industries, 789 F. 2d 540 (7th Cir. 1986)]. However, under the exclusivity provision of the Worker's Compensation Act, an independent tort claim based on intentional infliction of emotional distress is barred [s. 102.03 (2), Stats.; and Zabkowicz, id., 789 F. 2d 540, at 544, 545].

b. Assault or Battery

In addition, it appears that sexual harassment constituting an assault or a battery may be compensable under the Worker's Compensation Act (the definition of "sexual harassment" includes "unwelcome sexual advances" and "unwelcome physical contact of a sexual nature") [s. 111.32 (13), Stats.; and Jenson v. Employers Mutual Casualty Company, id.]. See item 2, below, for additional discussion of causes of action for assault or battery in the context of sexual harassment.

2. Independent Tort Actions for Assault or Battery

Under certain circumstances, a victim of sexual harassment in the workplace may have a cause of action in tort for assault or battery (i.e., a civil cause of action for damages). "Assault" has been defined as an "attempt, coupled with apparent and real present ability, to do bodily harm to another" [citation omitted; Jenson, id., 154 Wis. 2d at 319, 453 N.W. 2d at 167]. "Battery" has been defined to include "an unlawful touching of, or injury...in an angry, revengeful, rude or insolent manner..." [citation omitted; Becker v. Automatic Garage Door Company, id., 156 Wis. 2d at 416, 456 N.W. 2d at 891].

In Becker v. Automatic Garage Door Company, id., the Wisconsin Court of Appeals read prior case law to imply that "common law torts recognized before the adoption of the [Fair Employment Law] if properly pled independently of an employment *discrimination claim*, are not barred by the [Fair Employment Law]" [Becker, 156 Wis. 2d at 412, 413, 456 N.W. 2d at 889]. Finding that the right of a woman to pursue a battery claim under circumstances that might constitute sexual harassment was recognized well before the adoption of the Fair Employment Law, the Court of Appeals held that the Fair Employment Law does not preempt a cause of action for battery arising out of sexual harassment in the workplace under certain circumstances. The Court of Appeals noted that the claimant in Becker did not assert in the battery cause of action that the perpetrators acted in the capacity of company agents or supervisors, but that the tort claim for battery was made independently of the Fair Employment Law [Becker, 156 Wis. 2d at 415, 416, 456 N.W. 2d at 890, 891]. The Court further stated:

> If a complaint alleges an act of employment discrimination based upon conduct falling within the...definition [of sexual harassment under the Fair Employment Law], he or she must pursue the administrative remedies through the [Fair Employment Law]. On the other hand, when an individual asserts the tort of battery, not as an act of employment discrimination, but as an independent and unlawful touching of the person, the mere fact that the [Fair Employment Law] defines "sexual harassment" broadly enough to include battery does not defeat the claim. The gravamen of the action is the battery and whether she could have pursued an employment discrimination claim is irrelevant... [Becker, id., 156 Wis. 2d at 416, 417, 456 N.W. 2d at 891].

Note that it was assumed in Becker that an action for battery was not barred by the Worker's Compensation Act.

Because it has been held that the Worker's Compensation Act does not preclude a tort claim against a co-employe for an assault intended to cause bodily harm, an independent assault action arising from sexual harassment is presumably also available in Wisconsin [Jenson, id.]. Based on the Becker case, it appears that an independent tort action for assault from sexual harassment must be pled independently of the Fair Employment Law.

PART II

WISCONSIN LAW ON SEXUAL HARASSMENT: OTHER STATUTORY PROVISIONS AND RECENT LEGISLATION

This Part describes current statutory provisions relating to sexual harassment directed to the University of Wisconsin (UW) System and State Vocational, Technical and Adult Education (VTAE) System. In addition, legislation relating to sexual harassment which was introduced but not enacted in recent legislative sessions is summarized.

A. STATUTORY PROVISIONS REQUIRING INFORMATION ON SEXUAL HARASSMENT TO STUDENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM AND VOCATIONAL, TECHNICAL AND ADULT EDUCATION SCHOOLS

The Board of Regents of the UW System is required to direct each institution and center within the UW System to incorporate in its orientation program for newly entering students oral and written information on sexual harassment, including:

1. Services available at the institution or center and in the community to assist a student who is a victim of sexual harassment.

2. Protective behaviors, including methods of recognizing and avoiding sexual harassment and locations in the community where courses on protective behaviors are provided [s. 36.11 (22) (a) 1 (intro.), c and d, Stats.].

The information on sexual harassment included in the institution's or center's orientation program for new students is to be provided to all students on an annual basis in printed material supplied to each student. Annually, the Board of Regents is required to submit to the Legislature a report indicating the methods each institution and center have used to comply with the above requirements.

Section 38.14 (11), Stats., requires each district VTAE board to provide identical sexual harassment-related information to district students and submit the same report to the Legislature.

B. RECENT LEGISLATION: 1991 SENATE BILL 297, RELATING TO LIABILITY OF PUBLIC EMPLOYES FOR DISCRIMINATION AND SEXUAL HARASSMENT

1991 Senate Bill 297, relating to liability of public employes for discrimination and sexual harassment, was introduced by Senator Cowles, with Representative Fortis as primary cosponsor. The proposal was referred to the Senate Committee on Judiciary and Consumer Affairs, which held a public hearing on the proposal in October 1991. Senator Cowles introduced Senate Substitute

Amendment 1 to Senate Bill 297 in March 1992. The proposal received no further action by the Legislature during the 1991-92 Legislative Session. Following is a description of the proposal, as shown by Senate Substitute Amendment 1, the latest iteration of the proposal (note that Senate Bill 297 was based on 1989 Senate Bill 543, also introduced by Senator Cowles).

Under Senate Substitute Amendment 1 to Senate Bill 297, an officer or employe of the state or a political subdivision of the state would be personally liable to their employing governmental unit for 25% of any payment made by that governmental unit on a judgment rendered against the employe or officer because he or she was found to have engaged in discrimination or sexual harassment within the scope of his or her employment. Under current law, the employing governmental unit generally is responsible for paying the judgment and the employe is under no obligation to reimburse the governmental unit. "Sexual harassment" has the same definition as that contained in the Fair Employment Law [s. 111.32 (13), Stats.]. The liability would extend to damages and costs ordered in the judgment, including attorney fees of the plaintiff, reinstatement costs and back pay.

Related provisions of the proposal include the following:

1. Personal liability of an employe or officer would extend to any settlement agreement relating to an action or proceeding in which the initial complaint contained an allegation of discrimination or sexual harassment, regardless of whether the initial complaint was subsequently withdrawn or modified.

2. The rule of joint and several liability would apply to situations where two or more officers or employes are found liable or situations where both the employing governmental unit and the officer or employe are found liable for discrimination or sexual harassment.

3. The personal liability provisions of Senate Bill 297 would not apply to: (a) an officer or employe who was acting under direct orders of his or her supervisor or under the advice of legal counsel of the employing unit; or (b) a supervising officer or employe whose only act of discrimination or sexual harassment was his or her failure to prevent or stop a subordinate from engaging in discrimination or sexual harassment that was occurring without the knowledge of the supervisor.

4. Any judgment in a discrimination or sexual harassment action against the state officer or employe would be charged to the general program operations appropriation of the state agency employing the officer or employe. Currently, payments made by the state in an action against a state official or employe are charged against a specific appropriation established to pay those damages and costs [see s. 20.455 (1) (b), Stats.]. [If the agency does not have a general program operations appropriation, the payment would be charged to the current appropriation in the Department of Justice established for the purpose of paying those damages and costs.]

5. Under the proposal, no policy of insurance or endorsement to a policy of insurance is to be construed to provide coverage for any part of the costs of the defense, damages and costs awarded in discrimination or sexual harassment actions against state and local officers and employes acting within the scope of their employment.

C. RECENT LEGISLATION: 1991 ASSEMBLY BILL 1079, RELATING TO SEXUAL HARASSMENT TRAINING AND EDUCATION IN THE WORKPLACE

1991 Assembly Bill 1079 was introduced late in the 1991-92 Legislative Session by Representative Notestein. The proposal's principal cosponsor was Senator Moen. Assembly Bill 1079 was referred to the Assembly Committee on Small Business and Education or Training for Employment. The proposal received no further legislative action.

1. Definition of "Sexual Harassment"

Assembly Bill 1079 amended the definition of "sexual harassment" under the Fair Employment Law to include "unwelcome requests for sexual favors."

2. Prohibited Conduct in Relation to Sexual Harassment

Assembly Bill 1079 revised the provisions of the Fair Employment Law which specify what conduct in relation to sexual harassment comprises a prohibited act of employment discrimination. The proposal expressly made it a prohibited act to make or permit rejection of sexual harassment the basis or any part of the basis for any employment decision affecting an employe. The current prohibition against permitting sexual harassment to substantially interfere with an employe's work performance or to create an intimidating, hostile or offensive work environment was revised to prohibit permitting sexual harassment to "have the purpose or effect of" substantially interfering with work performance or creating a hostile work environment.

3. Failure to Inform Employer of Sexual Harassment

Assembly Bill 1079 expressly provided that failure of an employe to inform the employer of an act of sexual harassment does not preclude the employe from filing a complaint charging sexual harassment with DILHR or the Personnel Commission.

4. Workplace Posting

Assembly Bill 1079 required all employers to post, in one or more conspicuous places where notices to employes are customarily posted, a notice providing at least the following information:

a. A warning that sexual harassment is illegal.

b. A description of what constitutes sexual harassment, using examples to illustrate the various forms sexual harassment may take.

c. The employer's policy regarding sexual harassment.

d. The complaint process available through the employer for resolving a complaint charging sexual harassment.

e. The complaint process available through DILHR (or, if the employer is a state agency, the complaint process available through the Personnel Commission) for resolving a complaint charging sexual harassment and how to contact DILHR (or the Personnel Commission).

5. Employe Notification

Assembly Bill 1079 required all employers, annually, to provide to each employe an individual written notice providing the following information:

a. The definition of sexual harassment under the Fair Employment Law.

b. The information required in the workplace notice under item 4 a, b, d and e, above. Information relating to the complaint process available through DILHR and the Personnel Commission is also to include the remedies available.

c. The Fair Employment Law's protection against retaliation against an individual because the individual has opposed any discriminatory practice covered by the Fair Employment Law or because the individual has made a complaint, testified or assisted in any proceedings under the Fair Employment Law [s. 111.322 (3), Stats.].

6. Employe Education and Training

Assembly Bill 1079 required all employers employing 10 or more employes at any one work site to conduct a sexual harassment education and training program for all new employes within 90 days after the new employe commences employment. In addition to requiring the information required under the employe notification provisions described under item 5, above, the program would be required to provide the definition of sexual harassment under federal law.

For new supervisory and managerial employes of employers employing 10 or more employes, the proposal required the employer to conduct an education and training program, including training in the specific responsibilities of supervisory and managerial employes and the methods that those employes must use to ensure immediate and appropriate corrective action in addressing complaints charging sexual harassment.

7. Internal Complaint Process

Assembly Bill 1079 required employers employing 10 or more employes at any one work site to provide a formal, internal complaint process for resolving complaints charging sexual harassment. The complaint process was required to provide:

a. The identity of the individual, office or department with which to file a sexual harassment complaint and the identity of an alternate individual office or department with which to file a sexual harassment complaint if the subject of the sexual harassment charge is the individual, or is employed in the office or department, that ordinarily receives complaints charging sexual harassment.

b. Procedures for filing either orally or in writing complaints charging sexual harassment.

c. Procedures to ensure that all complaints charging sexual harassment are kept confidential and investigated promptly and to ensure that a written record is maintained of all investigations of sexual harassment complaints filed with the employer.

d. Procedures for communicating the employer's resolution of a complaint charging sexual harassment to all parties involved.

e. A meeting between the parties to a sexual harassment complaint, with a representative of the employer present, following the employer's resolution of the complaint to ensure that the employer's resolution resolves the complaint to the satisfaction of all parties involved.

D. RECENT LEGISLATION: 1991 SENATE BILL 1, RELATING TO CREATING A PRIVATE CAUSE OF ACTION FOR CERTAIN CIVIL RIGHTS VIOLATIONS

1991 Senate Bill 1 was introduced by Senator Feingold; the chief cosponsor was Representative Marcia Coggs. [A companion bill, 1991 Assembly Bill 192, was introduced in the Assembly; however, most of the legislative action was on Senate Bill 1.] Variations of Senate Bill 1 had been introduced in previous legislative sessions. While Senate Bill 1 is much broader in scope than the area of sexual harassment, its enactment would be a significant change in Wisconsin law on sexual harassment.

Senate Bill 1 was referred to the Senate Committee on Judiciary and Consumer Affairs which held a public hearing on the proposal. The Judiciary and Consumer Affairs Committee introduced Senate Substitute Amendment 1 to the proposal and recommended passage of the proposal, as amended. Senate Bill 1 was then referred to the Joint Committee on Finance which also recommended passage of the proposal as amended by Senate Substitute Amendment 1. Senate Bill 1 was not taken up by the full Senate. The proposal is described below, as shown by Senate Substitute Amendment 1 (for convenience, the proposal is referred to as Senate Bill 1).

Senate Bill 1 provided that an aggrieved person could bring an action in circuit court against any other person (including the state) who injures the aggrieved person or causes the aggrieved person to be injured by violating art. I of the Wisconsin Constitution (declaration of rights) or subch. II of ch. 111 (Fair Employment Law). Under the proposal, the court was authorized in such an action to award a prevailing plaintiff any appropriate equitable remedy or legal remedy, or both, including injunctive relief, compensatory damages, punitive damages, expert witness fees, reasonable attorney fees and costs. Thus, Senate Bill 1 would provide victims of sexual harassment an independent cause of action in state court.

Senate Bill 1 provided that if an action is commenced in circuit court, the person commencing the action would not be able to pursue an administrative remedy for the same injury. Provisions were included in the Bill for allowing an action in circuit court even if the administrative process has already been invoked, if the circuit court action is timely brought. If the court action is timely commenced, the administrative action is dismissed (without prejudice). If the court action is not timely brought, the court action is to be dismissed.

Senate Bill 1 provided a statute of limitations that required the action to be brought within six years after the injury occurred. In addition, the proposal specifically provided that the rights and remedies under the Bill and under the Fair Employment Law are not limited by the rights or remedies available under ch. 102 (worker's compensation), Stats.

Four amendments were introduced to the Substitute Amendment to Senate Bill 1:

1. Senate Amendment 1 reduced the statute of limitations from six years to four years.

2. Senate Amendment 2 removed reference in the statutory cause of action under the proposal to violations of art. I of the Wisconsin Constitution (i.e., causes of action would have been limited to violations of the Fair Employment Law).

3. Senate Amendment 3 reduced the statute of limitations from six years to 300 days.

4. Senate Amendment 4 permitted the court to award appropriate equitable and legal remedies to any prevailing party, not just a prevailing plaintiff.

PART III

FEDERAL LAW ON SEXUAL HARASSMENT IN THE WORKPLACE

The body of federal law relating to sexual harassment is found in the Federal Fair Employment Law, Title VII of the Civil Rights Act of 1964 (referred to as "Title VII"), as interpreted by the enforcement agency, the Equal Employment Opportunity Commission (EEOC) and the federal courts. Because very little of the law is set forth in federal statutes, the EEOC and the courts have played a large role in carving out the law of sexual harassment.

A. DEFINITION OF SEXUAL HARASSMENT UNDER FEDERAL LAW AND GUIDELINES

1. Title VII

Title VII specifies that it is an unlawful employment practice for an employer of more than 14 employes to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his or her compensation, terms, conditions or privileges of employment, because of the individual's race, color, religion, sex or national origin [42 U.S.C. s. 2000e-2 (a)].

In contrast to Wisconsin's Fair Employment Law, Title VII does not expressly prohibit or define sexual harassment in the workplace.

However, in 1980, the EEOC, charged with enforcing the federal fair employment laws, issued regulations (referred to in the federal system as "guidelines") setting forth the forms of sexual harassment determined by the EEOC to be in violation of Title VII [29 C.F.R. s. 1604]. The U.S. Supreme Court held, in 1986, that the Commission's guidelines were within the parameters of Title VII [Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 477 U.S. 57 (1986)].

2. EEOC Guidelines

The EEOC guidelines have never been codified in federal statutes, but have been updated and expanded upon by the EEOC, most recently in March 1990 in the form of "policy guidance." These guidelines provide extensive detail regarding claims of sexual harassment under federal law, including guidance to determine whether sexual harassment has occurred and what the employer's liability is for sexual harassment by supervisors.

Under the EEOC guidelines, sexual harassment is defined as unwelcome conduct of a sexual nature that is a term or condition of employment. The EEOC guidelines recognize two types of sexual harassment: "*quid pro quo*" and "*hostile environment*" sexual harassment. Basically, quid pro quo harassment occurs when submission to, or rejection of, harassing conduct by an individual is used as the basis for employment decisions affecting the victim of the harassment; "hostile

environment" harassment occurs when the harassment unreasonably interferes with an individual's job performance, or creates an intimidating, hostile or offensive working environment that can constitute sex discrimination, even if it leads to no tangible or economic job consequences [29 C.F.R. s. 1604.11 (a) (1) to (3)].

According to the guidelines, sexual conduct is "unwelcome" if the employe did not solicit or incite it and regarded the conduct as undesirable or offensive. If the victim of harassment in some manner asserts his or her right to a workplace free from sexual harassment, for example, by protesting or filing a complaint, the unwelcomeness of the sexual conduct is clear. However, a victim of harassment need not always confront the harasser directly, so long as the victim's conduct demonstrates the harasser's behavior was unwelcome. A victim's consistent failure to respond to sexually oriented comments or behavior may be sufficient to communicate that the conduct is unwelcome.

For sexual harassment to violate Title VII, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Some of the factors involved in making this determination include: (a) whether the conduct was verbal or physical, or both; (b) how frequently it was repeated; (c) whether the conduct was hostile and patently offensive; (d) whether the alleged harasser was a co-worker or a supervisor; (e) whether others joined in perpetrating the harassment; and (f) whether the harassment was directed at more than one individual. According to EEOC guidelines, in determining whether unwelcome sexual conduct rises to the level of a hostile environment, the central inquiry is whether the conduct "unreasonably interferes with an individual's work performance" or creates "an intimidating, hostile or offensive working environment." The EEOC guidelines state that the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." This standard should consider the victim's perspective, and not stereotyped notions of acceptable behavior.

A hostile environment is created as a result of a severe incident or isolated incidents; however, a hostile environment claim generally requires a showing of a pattern of offensive conduct. In contrast, a "quid pro quo" claim may be based on a single sexual advance if it is linked to the granting or denial of employment benefits. Sexual harassment in the form of physical conduct on a single occasion may be sufficient to create a hostile working environment.

B. EXTENT OF EMPLOYER LIABILITY

With respect to employer liability, the EEOC guidelines state that an employer will always be held responsible for acts of "quid pro quo" harassment. This conclusion is based on employer liability for supervisors' discriminatory employment decisions in other types of Title VII violations. In "hostile environment" cases, the EEOC or a court would consider whether the harassing supervisor was acting in an agency capacity, and whether the employer had an appropriate and effective complaint procedure and whether the victim used the procedure. If the employer knew, or should have known, of the alleged harassment and the employer failed to take immediate and appropriate corrective action, the employer is liable for the harassment.

More guidance in the area of employer liability is found in EEOC regulations. Under these regulations, the EEOC must apply general Title VII principles to determine whether an employer, employment agency, joint apprenticeship committee or labor organization is responsible for its acts, and those of its agents and supervisory employes, with respect to sexual harassment. Liability may be found under the following circumstances:

1. If the alleged harasser is acting in a supervisory or agency capacity, the employer may be liable, regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

2. With respect to conduct between fellow employes, an employer is responsible for acts of sexual harassment in the workplace where the employer knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

3. An employer may be liable for the acts of nonemployes, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. The EEOC will examine the extent of the employer's control and any other legal responsibility the employer may have with respect to the conduct of nonemployes.

4. Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

The regulations also stress that prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employes of their right to raise (and how to raise) the issue of harassment and developing methods to sensitize all concerned [29 C.F.R. s. 1604.11].

C. PROCEDURES FOR PURSUING CLAIMS UNDER TITLE VII

1. Filing a Claim

There are two different procedures for filing claims under Title VII, depending on the geographic location of the employe.

If the act of discrimination occurred in an area where the EEOC has entered into an agreement with the state or local enforcement agency (referred to as a "706 agency"), the EEOC will defer any federal claims within that state to the 706 agency. The employe must first file the charge with the 706 agency within the time frame specified by the agency, not to exceed 180 days from the discriminatory act. If the 706 agency fails to resolve the complaint, a charge may be filed directly with the EEOC within 30 days of notification of the 706 agency's disposition of the matter

or within 300 days after the discriminatory act, whichever is earlier. [In Wisconsin, DILHR is the "706 agency" for purposes of Title VII employment discrimination claims for all types of employment discrimination except employer retaliation against an employe for exercising the employe's rights under Title VII.]

For acts of discrimination occurring in an area where there is no "706 agency," an employe must initiate legal action by filing a charge of discrimination with the EEOC within 180 days of the alleged harassment or other discriminatory act.

2. EEOC Procedures

Once a charge is filed with the EEOC, the EEOC has 180 days to investigate the claim to determine whether reasonable cause exists to believe that the allegations in the complaint are true. If reasonable cause is found, the EEOC must attempt to conciliate between the parties. If the EEOC fails to conciliate, the EEOC may bring a civil action against any respondent named in the charge. The claimant may intervene in the civil action.

If, within 180 days from the filing of the charge by the aggrieved person, the EEOC has not entered into a conciliation agreement or filed a civil action in court, it must issue a "right to sue" letter to the complainant, allowing her or him to proceed to federal court within 90 days from receipt of the letter. [See, generally, 42 U.S.C. s. 2000e-5.]

D. FEDERAL REMEDIES; RECENT CHANGES

Until recently, the EEOC was not authorized to provide remedies to a complainant under Title VII other than agreements entered into under a conciliation or settlement. If the complainant or the EEOC filed a civil action in federal court, the court could award back pay for not more than a two-year period; injunctive relief, such as reinstatement; and attorney fees.

Some commentators, including some federal courts, observed that the remedies of back pay and reinstatement are virtually meaningless to the complainant who has remained on the job despite the harassment. This is particularly true in cases of "hostile environment" sexual harassment [see, e.g., *Righting the "Unrightable Wrong": A Renewed Call for Adequate Remedies Under Title VII*, 34 St. Louis University Law Journal 567 (1990)].

In the late Fall of 1991, Congress passed and President Bush signed into law the Civil Rights Act of 1991, which makes a number of substantive and procedural changes, many of which affect persons bringing claims against their employers for sexual harassment under Title VII. The key changes that affect this type of action are:

1. Persons claiming unlawful intentional discrimination may be awarded compensatory and punitive damages by a court, in addition to other types of relief to which the complainant is currently eligible. Any party, in a case in which damages are sought, may demand a jury trial.

Total punitive damages and compensatory damages for noneconomic losses and future economic losses are limited to:

a. $50,000, if the employer employs 14 to 100 employes;

b. $100,000, if the employer employs 101 to 200 employes;

c. $200,000, if the employer employs 201 to 500 employes; and

d. $300,000, if the employer employs more than 500 employes.

2. Prevailing plaintiffs who are awarded attorney fees may also be awarded expert witness fees by a court.

3. Certain employes of the executive and legislative branches of the federal government, previously excluded from the protections of Title VII, are now covered. An agency, separate from the EEOC, is created to process these claims.

4. The EEOC is encouraged to use alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials and arbitration in resolving disputes under Title VII.

In July 1992, the EEOC issued a policy guidance clarifying a number of issues relating to new remedies under the Civil Rights Act of 1991, including the following:

1. All covered employers and labor organizations with fewer than 100 employes are subject to the $50,000 cap on damages, even though the Act refers only to employers with more than 14 and fewer than 100 employes.

2. Front pay, back pay, interest on back pay and any other relief that would have been available to a prevailing complainant under Title VII or other federal causes of action are not limited by the caps imposed under the Civil Rights Act of 1991.

3. Past economic losses are not subject to the cap on damages, as long as the complainant can show actual out-of-pocket expenses.

4. For purposes of determining the level of employer liability, the number of employes includes part-time as well as full-time employes.

E. COMPARISON WITH OTHER FEDERAL CAUSES OF ACTION

Certain categories of employes have other, alternative federal remedies under which unlimited damages may be awarded, primarily under the Reconstruction-era civil rights laws.

Employes of state or local units of government may, in addition to or in lieu of seeking relief under Title VII, bring claims under 42 U.S.C. s. 1983, alleging that the discrimination occurred under color of law, depriving the claimant of a right protected by statute or constitution. Successful plaintiffs in this type of action may be awarded damages in addition to injunctive relief and attorney fees.

Victims of race discrimination in employment may seek damages under 42 U.S.C. s. 1981, alleging that the discrimination victim has been deprived of the equal right to make and enforce contracts. Again, compensatory as well as punitive damages are available to a prevailing plaintiff in an s. 1981 action.

However, Title VII is the only federal recourse for private sector victims of sexual harassment.

F. RECENT FEDERAL CASE LAW

Due to the relative newness of the EEOC guidelines and the Civil Rights Act of 1991, as well as the heightened attention provided to the issue of sexual harassment following the U.S. Senate hearings to confirm Clarence Thomas to the Supreme Court, several areas of sexual harassment law are still in a state of flux as cases progress through the federal courts. The following is an overview of a few of the key issues which are in the process of being resolved by the federal district courts and courts of appeals.

1. Elements of a Hostile Environment Sexual Harassment Claim

Five elements have been developed by the courts to determine whether a claim has been stated for sexual discrimination based on the existence of a hostile work environment:

a. Whether the plaintiff belongs to a protected category.

b. Whether the plaintiff was subject to unwelcome sexual harassment. Unwelcomeness is based upon an examination of whether the employe solicited or incited the conduct and whether the employe regarded the conduct as undesirable or offensive.

c. Whether the harassment complained of was based on the plaintiff's gender.

d. Whether the harassment affected a term, condition or privilege of employment.

e. Whether the defendant employer knew or should have known of the harassment and failed to take prompt, effective remedial action [Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M. Dist. Fla., 1991).

2. Severity of Conduct for Establishing Hostile Environment Claim

Courts have held that, in order to affect a term, condition or privilege of employment, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment [Vinson, supra]. The 9th Circuit Court of Appeals has stated that the test is whether the conduct creates an intimidating, hostile or offensive environment or whether it unreasonably interferes with work performance [Ellison v. Brady, 924 F. 2d 872 (9th Cir. 1991)].

Although a series of cases in the mid-1980's required a finding of such demeaning conduct and sexual stereotyping that caused such anxiety and debilitation to the plaintiff that working conditions were poisoned or conduct that seriously affected the plaintiff's psychological well-being [see Scott v. Sears, Roebuck & Co., 798 F. 2d 210 (7th Cir. 1986); and Rabidue v. Osceola Refining Co., 805 F. 2d 611 (6th Cir. 1986)], more recent decisions have rejected these extreme tests [e.g., Andrews v. City of Philadelphia, 895 F. 2d 1469 (3rd Cir. 1990); and Ellison, supra].

In addition, separate instances of harassing conduct may be viewed cumulatively. A court should examine the totality of the circumstances, not "carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode" [Burns v. McGregor Electronics Ind., 955 F. 2d 559 (8th Cir. 1992)].

3. Point of View in Determining Hostile Environment

A key issue in determining whether conduct is considered sexual harassment is whether the conduct is to be viewed from the perspective of the actor, the victim or some "reasonable person." Courts are still divided on this issue, although more recent decisions have favored a "reasonable person" standard that focuses on the point of view of persons who are the same gender as the victim.

The EEOC Compliance Manual urges courts to consider the victim's perspective and not stereotyped notions of acceptable behavior [Compliance Manual (CCH), s. 615, par. 3112, C (1988)]. The rationale for this was succinctly expressed by the 9th Circuit Court of Appeals:

> If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.... A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women.... By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in

return for the privilege of being allowed to work and make a living" [Ellison v. Brady, supra, at pp. 878-880; citations omitted].

The 3rd Circuit Court of Appeals has applied a test that includes both an objective standard and a subjective standard: whether the discrimination would detrimentally affect a reasonable person of the same sex in that position; and whether the discrimination detrimentally affected the plaintiff. The subjective standard is similar in application to the standard in Ellison, above; the objective standard is critical in determining whether the individual plaintiff was harmed by the conduct and what relief to which she may be entitled [Andrews v. City of Philadelphia, supra (3rd Cir. 1990)].

4. Victim's Conduct or Personality as a Defense

Courts are not unwilling to examine the conduct of the plaintiff in assessing whether the conduct complained of was unwelcome. Recently, the Court of Appeals for the 7th Circuit concluded that the alleged harassing behavior was "by any objective standard...to say the least, repulsive." However, the plaintiff "not only experienced this depravity with amazing resilience, but she also relished reciprocating in kind" [Reed v. Shepard, 939 F. 2d 484 (7th Cir. 1991)]. The Court noted that, although the plaintiff suggested that tolerating and contributing to the crudeness of the work environment was necessary for her career, other female employes testified at the trial that the male employes did not behave in this manner around women who asked them not to.

In a case in the 8th Circuit Court of Appeals, the Court reversed the district court's finding that a plaintiff could not have been offended by sexually directed comments and the exhibition of pornographic pictures at work, because she had willingly appeared in nude photographs in a magazine. The Court of Appeals noted that the plaintiff's appearance related to an activity outside of the workplace, and may have been relevant to the context of some of the comments directed at the plaintiff by her co-workers, but did not entirely undermine her claim of harassment [Burns v. McGregor Electronic Ind., supra (8th Cir. 1992)].

5. Sexual Nature of Offensive Conduct

The EEOC guidelines refer to sexual harassment in the form of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" [24 C.F.R. s. 1604.11]. However, a number of appellate courts have recognized that conduct of a nature other than sexual may be the basis for a claim of sexual harassment. "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances" [Andrews v. City of Philadelphia, supra, at p. 1485, citing similar decisions in the 8th, 10th and D.C. Circuits].

6. Employer Liability for Acts of Employe

In determining whether an employer is liable for a sexually hostile environment created by employe conduct, courts look at: (a) whether the employer knew or should have known of the harassment; and (b) whether the employer failed to take prompt remedial action [Andrews v. City of Philadelphia, supra, at p. 1486].

A key question in determining liability of an employer is whether the action taken is "reasonably calculated to end the harassment." In a particularly pervasive case of sexual harassment of a number of female employes of a utility company, where the males vastly outnumbered females, a federal district court found that simply discussing a plaintiff's allegations with some of the more active perpetrators was insufficient to relieve the employer of liability. Despite this minimal response, the harassment continued to be severe and pervasive for several years afterwards. Recognizing that the very nature of sexual harassment inhibits its victims from coming forward because of fear of retaliation, the court found that the employer in this case had an affirmative duty to conduct further investigations to document the level of harassment and analyze the level of sexual hostility in the workplace [Hansel v. Public Service Co., 778 F. Supp. 1126 (D. Colo., 1991)].

PART IV

SEXUAL HARASSMENT LAWS AND LEGISLATION IN OTHER STATES

This Part of the Staff Brief describes provisions of the laws of Iowa, Hawaii and Maine relating to sexual harassment, as well as legislation that has been adopted recently in California.

A new statute in Iowa includes specific definitions of the type of conduct that may be considered sexual harassment. Under the Iowa law, sexual harassment includes the following:

a. Unsolicited sexual advances by a person towards another person who has clearly communicated the other person's desire not to be the subject of those advances.

b. Sexual advances or propositions made by a person having superior authority toward another person within the workplace.

c. Instances of offensive sexual remarks or speech or graphic sexual displays directed at a person in the workplace, who has clearly communicated the person's objection to that conduct, and where the person is not free to avoid that conduct due to the requirements of the employment.

d. Dress requirements that bear no relation to the person's employment responsibilities (1992 Iowa Senate File 316, signed into law on April 15, 1992).

The Hawaii Legislature recently enacted a law that permits victims of sexual harassment or sexual assault (and for infliction of emotional distress or invasion of privacy related to either of these claims) to bring a civil action against the employer, even though the victim has recovered for injuries suffered under the state's worker's compensation law (1992 Hawaii Act 275, effective June 19, 1992).

The State of Maine passed legislation in 1991 that requires employers to "ensure a workplace free of sexual harassment" by implementing the following requirements:

a. Posting information on the illegality of sexual harassment, examples of sexual harassment and a description of the complaint process available through the State's Human Rights Commission. The employer may use a poster provided by the Commission for this purpose.

b. Providing employes with an annual written notice that describes sexual harassment and the fact that such harassment is illegal. The notice must also provide information on the internal complaint process available to the employe, the Commission's complaint process and other relevant information.

c. In workplaces with 15 or more employes, conduct an education and training program for all new employes within one year of their employment. The law also specifies the information that must be included in the education and training program.

The law specifies that employes include both full-time and part-time employes and "employer" is broadly defined and expressly includes the State of Maine.

Legislation introduced in the California Legislature on January 6, 1992 would require employers to post notices regarding discrimination in employment, including the illegality of sexual harassment. In addition, employers must distribute a brochure to each employe providing information on the illegality of sexual harassment, definitions and descriptions of sexual harassment, including examples, a description of the employer's internal complaint process and the state's procedures for hearing complaints of sexual harassment. The poster and brochures may be those provided by the California Department of Fair Employment and Housing (1992 Assembly Bill 2264).

As introduced, the Bill would also have imposed a requirement that employers of 15 or more employes conduct an education and training program including specified information on sexual harassment. Local units of government and school districts would be reimbursed by the state for any expenses related to this requirement. These provisions were deleted from Assembly Bill 2264 by the Assembly.

Another California Bill, 1992 Assembly Bill 2265, would establish that the existence of a hostile working environment in a claim of sexual harassment is to be determined from the point of view of a reasonable person of the same gender as the victim. The sexual harassment law would be amended to expressly state that hostile work environment is established when there is unwelcome sexual conduct that a reasonable person of the same gender as the complainant would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Assembly Bill 2264 passed the California Legislature on September 4, 1992. Assembly Bill 2265 passed the Legislature on August 31, 1992. Both Bills are awaiting the Governor's signature.

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